Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

W. GREG SHELTON

Petitioner

vs.

BENEFIT PLAN OF EXXON CORPORATION AND PARTICIPATING AFFILIATES, M. ASIF BEG, CIGNA INSURANCE CO.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fifth Circuit erred in applying the deferential "abuse of discretion" standard in this case to an ERISA plan administrator's denial of benefits, because the abuse of discretion standard is contrary to the stated purpose of ERISA – the protection of employees.

(a) Whether this Court should resolve the split in the Circuit Courts of Appeals with respect to the standard of review to be applied to an ERISA plan administrator's denial of ERISA benefits by holding that the "de novo" standard is consistent with the intent of ERISA.

(b) Whether this court should resolve the issue of what weight is to be given an ERISA plan administrator's conflict of interest when denying ERISA benefits by holding that such conflict of interest should be given substantial weight.

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PETITION FOR WRIT OF CERTIORARI

Petitioner W. Greg Shelton ("Petitioner") hereby requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued an unpublished Order affirming the United States District Court for the Southern District of Texas' Order Granting Defendant's Motion For Summary Judgment (App. at 1). The United States District Court for the Southern District of Texas' Opinion with respect to its Order Granting Defendants' Motion for Summary Judgment is reported at 8 F.Supp.2d 616 (S.D. Tex. 1998). (App. at 2)

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals (App. at 1) was entered on June 4, 1999. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Specifically, Petitioner brought suit under ERISA § 1132(a)(1)(B) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, and to clarify his rights to future benefits under the terms of the plan."

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition In the Courts Below

On September 8, 1997, W. GREG SHELTON (hereinafter "Petitioner") sued Benefit Plan of Exxon Corporation and

Participating Affiliates (the "Plan"), M. Asif Beg, Employee Relations Manager of Exxon Corporation, Administrator of the Plan, and Cigna Insurance Company (hereinafter collectively referred to as "Respondents") relating to his entitlement to coverage and benefits under the Plan. (1 R 001-024[1]). Petitioner sued for plan benefits pursuant to ERISA § 1132. (1 R 020).

Respondent filed a Motion for Summary Judgment on March 9, 1998 (1 R 048-182), to which Petitioner timely filed a response on March 20, 1998. (1 R 186-387). On May 8, 1998, Petitioner filed a Supplemental Response to Defendant's Motion for Summary Judgment (1 R 398-457), to which Respondents responded on May 28, 1998. (1 R 479-552). On May 27, 1998, the district court granted the Motion for Summary Judgment. (1 R 466-477).

Petitioner timely filed a notice of appeal to the Fifth Circuit Court of Appeals. (1 R 553-555). On June 4, 1999, the Fifth Circuit Court of Appeals summarily affirmed the trial court's Order Granting Defendants' Motion for Summary Judgment.

B. Prior History Among the Parties

Petitioner Shelton appeared before the district court previously in litigating his wrongful discharge from Exxon. *W. Greg Shelton v. Exxon Corporation, Exxon Chemical Co., and Exxon Corporation, d/b/a Exxon Chemical Co.*, C.A. No. G-96-307, In the United States District Court for the Southern District of Texas, Galveston Division. Significantly, Petitioner had developed a large amount of evidence suggesting that his employer, Exxon Chemical Co., discharged him wrongfully. Exxon filed a motion for summary judgment arguing its pretextual reasons for terminating Petitioner were true. That motion was denied. Literally on the eve of trial, the

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1 All references to "1 R." refer to the Record on Appeal

litigation was settled with no ultimate factual determinations made regarding whether Petitioner was wrongfully discharged.

The prior litigation is significant because the issue of whether Petitioner was wrongfully terminated, and whether the facts of that termination should have been thoroughly investigated by the Plan Administrator in this litigation, raised a genuine issue of material fact and has a direct bearing on this Petition. Also, Respondents in this litigation have suggested that Petitioner was terminated properly and for good cause. Moreover, Respondents have suggested that there was no controversy over the reasons or motivations for Petitioner's termination. Finally, Respondents, in their Motion for Summary Judgment, attempted to use the argument that Petitioner was fired correctly to bolster the decision to deny Petitioner Plan benefits by Respondent Beg.

By contrast, however, Petitioner believes he was wrongfully terminated so that, among other things, he would not be eligible for benefits under the Plan. Asif Beg, the Plan Administrator, failed in his fiduciary duty to Petitioner in not properly investigating the reason for Petitioner's termination.

C. The Plan

The ERISA plan at issue in this case, the Benefit Plan of Exxon Corporation and Participating Affiliates, provides that the Administrator of the Plan shall be the Human Resources Department Manager of Exxon Company, U.S.A., a division of Exxon Corporation. (1 R 098). The Administrator is given "discretionary and final authority to determine the eligibility and to administer" the Plan, and "discretionary and final authority to interpret [the Plan], in whole or in part, including but not limited to, exercising such authority in conducting a full and fair review, with such interpretation being conclusive for all participants and beneficiaries relying on [the Plan]. (1 R 097-98). If a person has 15 complete years of service with the company, and is terminated for incapacity, the person

qualifies for annuitant status (which means increased benefits to the beneficiary), unless the person's employer would not otherwise have terminated the person for any reason. (1 R 077-78).

In this case, it is Petitioner's contention he was terminated for his incapacity and is thus entitled to annuitant status. Respondents argue Petitioner would have been terminated anyway due to his personal use of company-owned personal computers and expense account irregularities. However, it is clear Respondents looked for a reason to terminate Petitioner for cause in order to deny him annuitant status and additional benefits under the Plan, rather than thoroughly investigating Petitioner's entitlement to benefits under the Plan and the facts surrounding his termination.

D. Relationship of the Parties

At all times material to this case, Petitioner, W. Greg Shelton, was an employee of Exxon Chemical Co. and reported to Larry Randolph, the Human Resources Manager for Exxon Chemical Co. located at Baytown, Texas, of which Mr. Shelton was a part. (1 R 401A). At the time of Petitioner's termination, Kurt Wiese was the Human Resources Manager for Exxon Chemical Co. responsible for human resources strategies for Exxon Chemical Co.'s worldwide business (1 R 413); and Asif Beg was the Human Resources Manager for Exxon Co. U.S.A. and Plan Administrator (1 R 446). Shortly after Petitioner's claim for benefits was denied, Kurt Wiese became Human Resources Manager for Exxon Co. U.S.A. and Plan Administrator. Mr. Beg, at the time of Petitioner's termination, was responsible for plan administration over all Exxon entities, and then Mr. Wiese took over that position a short time after the claim for benefits was denied. (1 R 447). Both Mr. Wiese and Mr. Beg officed in Houston (1 R 446). Exxon Co. U.S.A. and Exxon Chemical Co. are both divisions of Exxon Corporation.

E. Statement of the Facts

In April 1980, Petitioner was hired by Exxon and thus began his fifteen (15) years of employment with Exxon. Petitioner held various managerial roles during his time of employment with Exxon. On February 16, 1995, Exxon demoted Petitioner and transferred him to the Baytown Chemical Plant as a Senior Staff Analyst in the Human Resources Department. On April 19, 1995, Petitioner was told to attend a meeting, but Petitioner asked his immediate supervisor to allow him to miss the meeting due to his feelings of embarrassment and humiliation at facing former supervisors and peers who would know of his recent demotion. However, Petitioner's supervisor forced Petitioner to attend the meeting. Petitioner left work on April 19, 1995, and was unable to return to work on April 20, 1995. On Friday, April 21, 1995, Petitioner left work on disability leave and was advised by medical professionals not to return to Exxon and to limit his association with Exxon employees.

On August 25, 1995, Exxon received a letter from Petitioner's counsel informing Exxon that Petitioner was represented by counsel, and that there were concerns over various improprieties Petitioner experienced or learned of during his employment with Exxon. (1 R 329-330) Three days later, on August 28, 1995, Exxon began an "audit" of Petitioner Shelton, looking for reasons to terminate him. Exxon maintains that sometime in October 1995 the audit investigation was completed.

Petitioner turned fifty (50) years old on October 11, 1995. Petitioner's birthday is part of his personnel file and is contained on forms within Exxon's files maintained on its employees. Despite Petitioner's doctors' orders not to associate with Exxon employees, despite it being Petitioner's birthday, despite the nature of Petitioner's mental disability which was well known to Exxon, and despite the letter informing Exxon that Petitioner was represented by counsel, Exxon called Petitioner directly, demanding he personally attend a meeting with Exxon auditors. Petitioner reminded the caller that he

was represented by counsel, was on medical leave and was under doctor's orders not to associate with Exxon personnel, yet the caller continued to demand that Petitioner personally attend a meeting at Exxon. Petitioner followed his doctor's advice and did not attend any meeting at Exxon.

On January 9, 1996, Petitioner sent a letter to Asif Beg, the Plan Administrator, notifying Beg and the Plan of his request for disability retirement with annuitant status. Annuitant status would have entitled Petitioner to an annuity, and medical, dental and other insurance for him and his family, rather than long term disability at 50% of his Exxon salary with no insurance benefits. On January 25, 1996, Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). On January 31, 1996, at Exxon's request, a copy of the EEOC Charge was faxed to Exxon. On February 1, 1996, Exxon reported Petitioner's April 21, 1995, injury to its worker's compensation carrier. On February 2, 1996, Exxon's worker's compensation carrier filed its contest of claim with the Texas Worker's Compensation Commission. On February 9, 1996, thirty days after Petitioner requested disability retirement with annuitant statute and while still on medical disability leave and unable to work, Petitioner was terminated from his employment with Exxon. There was no pressing reason to terminate Petitioner at that time. He was on medical disability leave and medically unable to return to Exxon work, and Respondents have never contested those facts. These facts, coupled with Petitioner's fifteen (15) years of service with Exxon automatically qualified him for disability retirement, with annuitant status. Until this time, Petitioner was receiving benefits equivalent to disability retirement with annuitant status. The only reason for Exxon to terminate Petitioner when it did was to retaliate against him for hiring legal counsel, filing an EEOC complaint and to deny him disability retirement with annuitant status, a status he had earned as a fifteen-year Exxon employee. Exxon had no intention of terminating Petitioner until after it received the notices of Petitioner's hiring of a

lawyer, filing of the EEOC complaint and requesting disability retirement with annuitant status.

The following time line summarizes these dates and events:

April, 1980: Petitioner is hired by Exxon, beginning his fifteen years of employment in human resources

February 16, 1995: Petitioner was demoted

April 19, 1995: Petitioner attends a meeting at the direction of his supervisor

April 20, 1995: Petitioner is off of work

April 21, 1995: Petitioner left work and began medical disability leave

August 25, 1995: Exxon received a letter from Petitioner's lawyer informing Exxon of Petitioner's legal representation

August 28, 1995: Exxon begins its audit investigation

October, 1995: According to Exxon, its audit investigation is completed.

October 11, 1995: Petitioner's 50th birthday; Exxon calls and demands Petitioner's attendance at a meeting with auditors in person, despite Petitioner's medical leave status, doctor's orders not to have contact with Exxon personnel and his representation by counsel

January 9, 1996: Having met all requirements for disability retirement and annuitant status, Petitioner sends a letter to Respondent Beg requesting disability retirement with annuitant status

January 25, 1996: Petitioner's EEOC charge is filed

January 29, 1996: Petitioner's attorney requests a copy of Respondents' investigative report and the right to respond thereto

January 31, 1996: At the request of Exxon, a copy of Petitioner's EEOC charge was faxed to Exxon

February 1, 1996: Exxon reports Petitioner's April, 1995 injury to its insurance carrier

February 2, 1996: Exxon's worker's compensation insurance carrier files its contest of claim with the Texas Worker's Compensation Commission

February 9, 1996: Petitioner is terminated from his employment with Exxon, just thirty (30) days after Petitioner's letter to Respondents requesting annuitant status

March 22, 1996: Respondent Beg writes a letter to Petitioner denying his request for disability retirement with annuitant status as a result of his February 1996 termination

A careful review of the facts and time line in this case reveals that Respondents were motivated by their retaliatory desire to deny benefits to Petitioner when Exxon terminated him. After leaving work on disability, Petitioner hired a lawyer who contacted Exxon. Three days later Exxon began an "audit" of Petitioner's work at Exxon, seeking any evidence at all that would allow Exxon to terminate Petitioner for cause, beginning the "circling of wagons" with respect to Petitioner's termination of employment and denial of benefits. Indeed, Petitioner was terminated 15 days after he filed an EEOC complaint against Exxon.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10(a) of the Rules of this Court, the Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Specifically, (i) what standard of review should be applied when a benefits decision turns on the *facts* of the case, rather than the *interpretation of the terms* in the ERISA plan; and (ii) what standard of review should be applied when an ERISA plan fiduciary, acting under an inherent conflict of interest, denies benefits to a plan participant.

Pursuant to Rule 10(c) of the Rules of this Court, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Specifically, how should an ERISA Plan Administrator, as a fiduciary, discharge his duty to investigate the facts surrounding the denial of benefits to a Plan Beneficiary?

A. The Split Among the United States Circuit Courts of Appeal

In *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991), the Fifth Circuit considered whether federal courts should apply the "de novo" standard of review this Court enunciated in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), to the situations when the benefits determination decision turns on the facts of the case, rather than the interpretation of the terms in the ERISA plan. This Court denied the beneficiary's Petition for Writ of Certiorari in that case but, significantly, Justices White and Blackmun dissented, noting a disagreement among the Circuit Courts of Appeals in this area. *Pierre v. Conn. Gen. Life Ins. Co.*, 502 U.S. 973, 112 S.Ct. 453, 116 L.Ed.2d 470 (1991) (White, J. & Blackmun, J. dissenting).

This case provides an opportunity for this Court to settle that disagreement among the Circuit Courts of Appeals by determining what standard of review should be applied to factual determinations of ERISA plan fiduciaries. Petitioner urges this Court to apply the "de novo" standard of review, consistent with the majority of the Circuit Courts of Appeals and in keeping with the stated purpose of ERISA – to protect employees.

B. The Failure of ERISA

The House of Representatives' Conference Report on the then pending ERISA legislation in 1974 indicated the Congressional intent underlying ERISA: for courts to interpret this new law in a manner similar to the aggressive federal law entitlement provided under the existing Labor Management Relations Act. H.R. Rep. No. 1280, 93rd Cong., 2nd Sess. (1974). One Senator even claimed that ERISA represented "the greatest development in the life of the American worker since Social Security." 120 Cong. Rec. S29,933 (1974). It was envisioned that a "body of Federal substantive law will be developed by the courts to deal with issues involving the rights and obligations under private welfare and pension plans." 120 Cong. Rec. S29,941 (1974). Another ERISA-sponsoring Senator opined that state and federal law previously had been ineffective in preventing or correcting abuses related to employee benefit plans. 120 Cong. Rec. S29,932 (1974).

To that end, ERISA provided for preemption of any all state laws that "relate to" a plan regulated by ERISA, and granted federal courts exclusive jurisdiction over nearly all disputes involving employee benefit plans. However, the result, after 25 years of litigation, has been far removed from the intent of the ERISA drafters. The result is also equally distant from the expectations of those who viewed preemption in this area of employee benefit plans as a plus for the workers of this country.

Current scholarly writings on the state of the law under ERISA includes the following:

> Federal Courts have undermined ERISA's primary goal, the protection of employees from fiduciary abuse, by refusing to supplement the statute with federal common law – a refusal that is based on judicial interpretation and not on legislative direction. The unwillingness to supplement and faithfully extend expressed legislative purpose has created a regulatory vacuum.

Richard Rouco, Available Remedies Under ERISA Section 502(A), 45 Ala. L. Rev. 631, 634 (1994).

> Affording plan participants and beneficiaries less protection under ERISA than the common law provided is anomalous at best in light of ERISA's stated policy and legislative history.

Gregory A. Hewett, Should Non-Fiduciaries Who Knowingly Participate In A Fiduciary Breach Be Liable For Damages Under ERISA?, 71 Wash.U. L.Q 773, 803 (1993).

> The extent to which the law has developed without any consideration of ERISA's purposes, principles, language and legislative history is remarkable, and stands as a paradigm of how federal courts should not develop common law.

Jay Conison, Suits For Benefits Under ERISA, 54 U. Pitt. L. Rev. 1, 57-58 (1992).

> ERISA, adopted almost twenty years ago to protect employees, now allows employers to enter what is, in effect, a regulation-free zone.

Alan I. Widiss & Larry Gostin, What's Wrong With The ERISA "Vacuum," 41 Drake L. Rev. 635, 654-55 (1992).

> Employees frequently are cheated out of employer-provided pension, health insurance and severance pay benefits. The reason is simple: the courts do not construe the law to protect employees.

William K. Carr & Robert L. Liebruss, Wrongs Without Rights: The Need For A Strong Federal Common Law of ERISA, 4 Stan. L. & Pol'y Rev. 221 (1993).

If ERISA was, in fact, enacted to protect the working man from fiduciary abuse, why has there been such a high volume of ERISA litigation? Five years ago, the Long Range Planning Committee of the U.S. Judicial Conference, in a report issued in November 1994, noted the filing of 10,536 ERISA actions in federal court in 1993 alone. National L.J., Jan. 9, 1995 at A26. ERISA provides redress for *employees* wronged by the company, the plan and/or its fiduciaries. Therefore, these tens of thousands of lawsuit being filed in the country annually consist of employees suing to recover benefits to which they are entitled, not by companies and employers. If the sole purpose of enacting ERISA is to protect employees, why are so many employees forced into litigation in order to receive benefits under ERISA plans?

Under the trial court's and the Fifth Circuit's interpretation of ERISA and subsequent case law, a plan fiduciary may assume his employer's termination of the employee by the equivalent of a co-employee was not wrongful but to the contrary, justified, and conduct no independent investigation at all into the denial of benefits under the plan, and that asking and relying on a biased company employee's, who terminated the employee, reasons for the employee's termination and denial of benefits, is an acceptable discharge of the Plan Administrator's duty to the employee beneficiary.

This case provides an ideal vehicle for this Court to undo 25 years of oppression and harm to American workers by allowing it the

opportunity to send a message to companies with ERISA plans and to ERISA plan fiduciaries: Investigate the facts underlying denial of ERISA benefits thoroughly with the beneficiary in mind, not the bottom line of the Plan. A fiduciary should have the highest responsibility to his employee beneficiary. Unfortunately, judicial interpretation of ERISA has given that much needed benefit in the workplace to the administrator of the employer controlled plan and not for the employee as intended. The Administrators actions in determining the facts underlying the denial of ERISA benefits should be reviewed "de novo" by the federal courts, rather than under the less-exacting "abuse of discretion" standard.

C. The Deferential "Abuse of Discretion Standard" Applied by the Lowers Courts in this Case Is Contrary to the Stated Purpose of ERISA

(1) This Court Should Resolve the Split in the Circuit Courts of Appeals With Respect To The Standard of Review to be Applied to a Plan Administrator's Denial of ERISA Benefits By Holding That the "De Novo" Standard Is Consistent With the Intent of ERISA

In *Firestone*, this Court addressed the appropriate standard of review for claim denials under ERISA. Writing for the Court, Justice O'Connor criticized the resulting wholesale importation of the arbitrary and capricious standard into ERISA because in certain cases it had left employees worse off then they were before ERISA. This Court found that trust principles should guide the choice of standard of review for plan administrator actions. *Id.* at 954 (citing Restatement (Second) of Trust § 187 (1959)). It then noted that a trustee's decisions are accorded deferential treatment only where the instrument itself grants the trustee discretion. Therefore, deference to an ERISA benefit plan administrator's decision is appropriate only where the benefit plan grants discretion to the administrator to ***interpret plan terms.*** *Id.* at 953-56. The Court concluded that de

novo review of ERISA plans is appropriate only when the plan does not give the plan administrator discretionary authority to interpret plan terms. *Id.* at 956.

Firestone, however, turned on the interpretation of ambiguous plan terms. Here, however, the Court is not asked to interpret plan terms, but to focus on the fact-finding duty of the plan administrator. This Court heard the Firestone case as an appeal from the Third Circuit Court of Appeals, which court has since noted it specifically left the question of the standard of review for a plan administrator's factual determination open. *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1182 (3rd Cir. 1991) (citing *Bruch v. Firestone Fire & Rubber Co.*, 828 F.2d 134, 144 n.9 (3rd Cir. 1987), *aff'd in relevant part,* 489 U.S. 101 (1989)).

Since *Firestone*, a difference of opinions has arisen in the Circuit Courts of Appeals with respect to which standard of review should govern the plan administrator's factual determinations. Courts holding that a plan administrators factual determinations should be reviewed under a deferential standard of review even though the plan does not expressly provide that such determinations are discretionary are:

The Third Circuit: *Mitchell v. Eastman Kodak Co,* 113 F.3d 433 (3rd Cir. 1997).

The Fifth Circuit: *Pierre v. Connecticut Gen'l Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991).

Courts holding that the *Firestone* de novo standard of review applies to both factual determinations and plan interpretations by plan administrators are:

The Second Circuit: *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243 (2nd Cir. 1999).

The Third Circuit: *Luby v. Teamsters Health, Welfare, & Pension Trust Funds,* 944 F.2d 1176 (3rd Cir. 1991).

The Fourth Circuit: *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990); *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989).

The Sixth Circuit: *Brown v. Ampco-Pittsburgh Corp.,* 876 F.2d 546 (6th Cir. 1989).

The Seventh Circuit: *Ramsey v. Hercules Inc.,* 77 F.3d 1996 (7th Cir.1996); *Petrilli v. Drechsel,* 910 F.2d 1441 (7th Cir. 1990).

It is clear the majority of the Circuit Courts of Appeals apply the de novo standard of review, as urged by Petitioner here. As further amplification for the need for this Court to settle this issue, it is important to note that while the different Circuit Courts of Appeals are split on this issue, the Third Circuit Court of Appeals is ***internally*** split on this important matter. Granting Petitioner's Writ of Certiorari in this case would settle a much-litigated, confusing area of federal law.

(2) The Fifth Circuit's Application of the Deferential Abuse of Discretion Standard

The Fifth Circuit has held that before benefits are paid or denied, a plan administrator has to make determinations that may be divided into two general categories. First, he must determine the facts underlying the claim for benefits. Second, he must then determine whether those facts constitute a claim to be honored under the terms of the plan (i.e. interpretation of plan terms). *Pierre,* 932 F.2d 1552 (5th Cir. 1991), *cert. denied,* 502 U.S. 973 (1991). The lower courts in this case based their decisions on this more deferential standard of review.

This case does not turn on sophisticated plan interpretation issues. This Court is asked to consider only the actions of the Plan Administrator in investigating and determining the facts supporting the denial of increased benefits to Petitioner.

Since ERISA is silent as to the proper standard of review, the abuse of discretion standard for factual determinations arose out of Fifth Circuit case law. The abuse of discretion standard for the first determination – the facts underlying the claim for benefits – was determined by the Fifth Circuit in *Pierre*. In reaching this decision, the court noted that according to trust principals, an ERISA fiduciary possesses inherent authority to control and manage the operation of the plan.

The Plan at issue here provides for annuitant status (increased benefits) for 15-year employees who have been unable to return to work due to their incapacity, like Petitioner, unless Exxon can locate a reason to terminate the employee for cause.

The issues before this Court are (i) whether the cursory investigation by the Plan Administrator was adequate, which consisted of asking the employee who terminated the co-employee whether he was justified in terminating the co-employee, that is, did the evidence *available* to the Administrator support a denial of benefits?; and (ii) whether the "de novo" or the "abuse of discretion" standard of review should have been applied.

(3) The Evidence Considered By the Lower Courts

In the Fifth Circuit, a distinction has been made between the evidence to be considered when reviewing a plan administrator's factual determination and the evidence considered when determining whether the administrator abused his discretion in denying benefits:

> [W]e now make manifest that a district court is not confined to the administrative record in determining whether, under our

> analytical framework, a plan administrator abused his discretion in making a benefit determination. This is not to say that a litigant dissatisfied with an administrator's benefit determination is free to disregard the evidence before the administrator and relitigate in court the historical facts surround a claim. We have long held that in conducting review under an abuse of discretion standard, a district court should evaluate the administrator's fact findings regarding the eligibility of a claimant based on the evidence before the administrator, assuming that both parties were given an opportunity to present facts to the administrator. Yet, in these and other opinions, we have also explained how other evidence, not dealing with the historical facts underlying the benefit determination, and therefore usually not in the administrative record, was relevant under our abuse of discretion analysis.

Wilbur v. Arco Chemical Co., 974 F.2d 631, 639 (5th Cir. 1992). Therefore, the Fifth Circuit federal courts are allowed to go beyond the administrative record in determining whether a plan administrator abused his discretion. In this case, a lot of information was available to the Plan Administrator, but he chose to ignore based on hisperception of what Exxon management wanted. He thus violated his fiduciary duty to Petitioner.

(4) <u>The Plan Administrator Abused His Discretion by Failing to Investigate Petitioner's Request for Annuitant Benefits Under the Plan</u>

Section 404(a)(1) of ERISA imposes a basic duty on plan fiduciaries to act "solely in the interest" of plan participants and beneficiaries. Subsection (A) of this section adds the requirement that the fiduciary act for the "exclusive purpose" of providing plan benefits and defraying reasonable expenses of plan administration. Although courts occasionally distinguish between the two, most courts have treated the "solely in the interest" and "exclusive

purpose" standards interchangeably as codifications of the trust law duty of undivided loyalty.

Furthermore, Section 404(a)(1)(B) of ERISA requires a plan fiduciary to act with the "care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." This is ERISA's "prudent person" test. With respect to the prudent person test, the Fifth Circuit has held that "a pure heart and an empty head are not enough." *Donovan v. Cunningham,* 716 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984). In *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2nd Cir.), *cert. denied,* 459 U.S. 1069 (1982), the court stressed the high degree of care required under ERISA's prudence standard and noted, more generally, that an ERISA fiduciary's duties were "the highest known to the law."

The facts in this case show that the actions of the fiduciary of the Plan at issue in this case illustrate the fiduciary was not acting in the "sole interest" of Petitioner, nor were his actions prudent under the circumstances.

When Petitioner applied for disability retirement and annuitant status, he did so through Asif Beg, Administrator of the Plan. As the Plan Administrator, Beg was a fiduciary of the Plan under ERISA. ERISA § (3)(21)(A). In addition to serving as Administrator of the Plan, Beg also served as Human Resources Manager for another division of Exxon. The person who made the determination to terminate Petitioner succeeded Beg as Administrator of the Plan. According to the Plan, the Administrator has full and final discretionary authority to determine eligibility for Plan benefits. Pursuant to the Plan, Petitioner claimed he was and is entitled to disability retirement with annuitant status in that Petitioner had at least fifteen (15) years of service with Exxon prior to his disability and is unable to perform the job requirements of his position with Exxon due to his disability. These two very important facts are

uncontroverted as to his eligibility for benefits. It is very simple: Since Petitioner had 15 years of service and was incapacitated, he would get annuitant status and more benefits. However, if Exxon, or the Plan, could justify terminating Petitioner for cause, then Petitioner would get fewer benefits. Therefore, the fact that Exxon's "audit" found some reason for terminating Petitioner that had nothing to do with his disability is not surprising. The audit showed personal use of a computer which Petitioner was allowed to take home and for which there was no stated policy, and misuse of an expense account for mileage reimbursement in an insignificant amount. After interviewing and investigating back several years looking for a reason to terminate, this was the best they could do.

However, despite the legal and common sense necessity of the Plan Administrator, as part of his fiduciary duty, to conduct a thorough investigation prior to a decision denying benefits, Beg simply asked Exxon management, the very person who had terminated Petitioner and ultimately succeeded Beg, what had transpired, and took his biased version of the facts as true, thus denying Petitioner benefits and annuitant status. (1 R 430). The Administrator assumed his successor made the right decision, and looked into the matter no further.

Had Beg independently investigated Petitioner's request for disability retirement with annuitant status, and reconstructed the time line provided *supra* for the Court, he would have seen the retaliatory and pretextual nature of each of Exxon's actions. For instance, Exxon receives a letter from Petitioner's lawyer informing Exxon of Petitioner's legal representation, and Exxon immediately (within 3 days) begins an "audit" of Petitioner, searching for reasons to terminate him. The "audit" is completed in October 1995, but Exxon takes no action then. It is not until Exxon receives a letter from Petitioner's attorney and Petitioner's EEOC complaint against Exxon and Beg receives Petitioner's request for disability retirement with annuitant status that Exxon makes the decision to terminate Petitioner. Then, predictably, Beg uses the termination for "cause"

as a reason to deny Petitioner the benefits to which he was entitled, simply taking the word of Exxon management as to the reason for Petitioner's termination.

Basically, under the Plan, the only way to prevent Petitioner from receiving the Plan benefits he had earned was to terminate him for cause. Once Exxon received the first letter from Petitioner's attorney, Exxon began its systematic plan to foreclose Petitioner's avenues of recovery of benefits under the Plan.

Even under the more exacting abuse of discretion standard of review, it is clear the Plan Administrator abused his discretion in denying Petitioner's claims for benefits, and Beg, who was employed by a separate division of Exxon, had an inherent conflict of interest in serving in the position of Plan Administrator because of his close affiliation and fidelity to Exxon. He therefore abused his discretion in denying Petitioner the benefits he had earned without thoroughly investigating the circumstances of Petitioner's disability and the reasons and timing of his termination.

Petitioner urges this Court grant his Petition for Writ of Certiorari and settle the split among the Circuit Courts of Appeals with respect to the proper standard of review to be applied when considering the factual determinations of an ERISA plan administrator. Petitioner further urges this Court to hold that the less exacting "de novo" standard of review should be applied to those factual determinations in keeping with the stated purpose of ERISA – the protection of employees. This case amplifies the need for guidance from this Court and serves as an example of the consequences of rubber-stamping a plan administrator's decisions.

Although the Circuit Courts of Appeals are split on what standard to apply, most admit that the plan fiduciary has a duty to investigate the facts before denying benefits. *See Pierre*, 932 F.2d at 1562 (the court must evaluate the plan's factual determinations "that reflect a reasonable and impartial judgment"); *Wilbur*, 974 F.2d at

639 (both parties must be given an opportunity to present facts to the administrator); *Quinn v. Blue Cross & Blue Shield Assoc.*, 161 F.3d 472, 476 (7th Cir.1998) (ERISA fiduciary is under a duty to investigate a claimant's claim for benefits and develop the reasonably available evidence).

In this case, it appears the Plan Administrator was able to determine from Exxon management, either through their expressed or implied actions, their feeling that Petitioner was a "trouble maker" and should be denied benefits. To that end, the Administrator set out to justify management's end goal and further punishment -- the denial of benefits – rather than acting solely in the interest of the employee/beneficiary.

Most importantly, Mr. Wiese admits it would be absolutely essential for the person who terminated Petitioner to be completely removed from the decision-making process concerning Petitioner's benefits. (1 R 401). Mr. Wiese testified that he considered it so important that he made absolutely no decisions after becoming Plan Administrator regarding Petitioner and turned it over to another person. (*Id.*) Mr. Beg testified that it would be a "conflict of interest" if the person who made the decision to terminate Petitioner to then make decisions regarding his benefits. (1 R 427). However, the evidence demonstrates that is exactly what happened.

Mr. Beg did absolutely nothing more than simply ask Mr. Wiese what happened with Petitioner's termination, and Mr. Wiese was the person who terminated Petitioner. Obviously, Mr. Wiese would not admit his actions were wrongful. Similarly, had Beg asked Petitioner whether the termination was appropriate, he would have said no. Whose response should be presumed correct, the employee or employer? According to the Fifth Circuit, the employer enjoys that presumption, and the Plan Administrator, as a fiduciary, can indulge that presumption and at the same time discharge his fiduciary duty to the employee. An independent, objective investigation into the facts of Petitioner's termination, beyond speaking to the person

who fired an employee and to the person fired, was necessarily required, but did not occur. A fiduciary should not be allowed to make a presumption adverse to a beneficiary/employee without a thorough and conflict free investigation. Thus, while there may have been a middle man in the presence of Mr. Beg, Beg did not act independently and there is absolutely no evidence that Mr. Beg did anything more than act as a conduit for Mr. Wiese's decision to terminate. Additionally, the evidence demonstrates that the motivation and timing of the termination, as illustrated by the timeline provided *supra,* was calculated simply to deny benefits to Petitioner.

Mr. Beg only contacted Mr. Wiese concerning the circumstances of Petitioner and his termination. (1 R 430) However, Mr. Wiese testified that Larry Randolph was the person to whom Petitioner's Human Resources group reported. (1 R 401A) Yet Mr. Beg did not interview Mr. Randolph, Petitioner's direct supervisor, about Petitioner and his termination, but chose to ask the person who terminated Petitioner about Petitioner and his termination. Then, Beg did absolutely nothing by way of follow-up investigation or to determine whether the facts and circumstances Mr. Wiese communicated to him orally, not in writing, were accurate. (1 R 430).

While Mr. Wiese testified that his decision to terminate Petitioner was made in November or December of 1995 (1 R 408), the time line also demonstrates that Petitioner inquired about benefits in January 1996, was terminated in February 1996, and then received, in March 1996, a letter denying his benefits, the basis of the denial being the intervening February termination.

Clearly, the deposition evidence of Beg and Wiese quoted above reveals discrepancies between their testimony and, as will be shown below, Beg's and Wiese's testimony conflicts with that of Kathleen A. Hannaman, the current Assistant Administrator-Benefits for the Plan. These discrepancies or contradictions raise credibility

issues of the affiants, whose affidavits were used to support Respondents' Motion for Summary Judgment and serve as an additional basis for the argument that Respondent's Motion for Summary Judgment should have been denied.

For instance, Mr. Beg testifies in his deposition that other persons were present during his conversations with Mr. Wiese. (1 R 426) Mr. Wiese testified that he does not remember any of the conversations taking place in person, that he recalls them all taking place over the telephone, and doesn't recall anyone else being present for these conversations. (1 R 402).

Ms. Hannaman testifies in her affidavit that the circumstances of Petitioner's termination were made known to her. (1 R 061). Ms. Hannaman took over her job as Assistant Plan Administrator after Mr. Beg had already moved on after May 1, 1996. Mr. Wiese testifies that he never communicated any of the circumstances of Petitioner's termination to Ms. Hannaman. (1 R 403).

The credibility of the witnesses upon whom Respondents rely concerning their motivations, as well as their conduct, is essential to a fair resolution of this case, and therefore Respondents' Motion for Summary Judgment should have been denied.

The information that the Plan Administrator had before him was that Petitioner had been off work on disability leave and then had been terminated. If Petitioner was required to retire because of his incapacity to perform Exxon work, he would receive annuitant status and greater benefits. If management could find another reason to terminate Petitioner, then annuitant status would be denied and the Plan's bottom line would not be impacted. Even under the heightened abuse of discretion standard of review, it's clear the Administrator did little or nothing to investigate Petitioner's request for benefits, or the reasoning behind his termination. However, by adopting a less deferential standard of review for the fiduciaries factual determinations, this Court can send a clear message to plan

fiduciaries that their actions will be carefully scrutinized by the federal courts. The stated purpose for the adoption of ERISA – the protection of employees who are eligible for benefits – demands that fiduciaries be held accountable for their factual determinations and investigations if they, in fact, are held to the standard of acting as a fiduciary. The trial court should have remanded this case to the Administrator of the Plan to conduct an independent, thorough and careful investigation into the facts surrounding Petitioner's requestfor benefits and termination indulging every presumption for the employee/beneficiary.

A genuine issue of material fact exists as to whether the Plan Administrator acted arbitrarily and capriciously; whether the reason for Petitioner's termination from Exxon was motivated by his hiring a lawyer, filing of the EEOC complaint; and/or whether Petitioner was terminated as further punishment and retaliation. If the answer to any of those factual questions is "yes," then Beg abused his discretion in presuming Petitioner was terminated for cause and then denying benefits to Petitioner. The district court's granting of summary judgment for Respondents should be reversed and this case remanded either to the district court for further proceedings or to the Plan Administrator to conduct an objective investigation surrounding the facts of Petitioner's incapacity and termination.

(5) This Court Should Resolve the Issue of What Weight Is To Be Given an ERISA Plan Administrator's Conflict of Interest When Denying ERISA Benefits by Holding That Such Conflict of Interest Should Be Given Substantial Weight

Plan administrators can hardly be considered disinterested adjudicators when their very employment depends on the severity of their claim handling practices. More often than not, the factual investigation is aimed at buttressing the decision to support denial of a claim for benefits, with little or no evidence obtained from the

participant, who is usually unrepresented by counsel. This "kangaroo court" exercise then produces a report for the court's consideration which often instinctually wants no part of the claims-decision making process, and has ample precedent to avoid it. Only the employee, and justice, suffer. This Court should give direction to plan administrators who serve in the dual capacity of employee for the company and as fiduciaries for the same company's ERISA plan. These fiduciaries have a Section 404 obligation to avoid placing themselves in a position where their acts as directors, officers and employees of a corporation will prevent their functioning with complete loyalty to participants demanded of them as trustees. *See Bierwirth*, 680 F.2d at 271.

Firestone made clear that the existence of conflicts of interest on the part of fiduciaries is relevant in determining whether their denials of benefits are arbitrary and capricious. *Firestone,* 489 U.S. at 115. The Court stated that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" *Id.* Since *Firestone,* courts have struggled to articulate the manner in which conflicts of interest alter or affect the standard of review. This case is an ideal vehicle for this Court to clarify the weight to be given fiduciaries acting under a conflict of interest. Petitioner urges the Court, should it decline to hold that the de novo standard of review is applicable to factual determinations by plan fiduciaries, to find that substantial weight should be given to such determinations.

Given the ERISA starting point of the general laws of trust administration, a number of courts begin their analysis with the presumption that there is an inherent conflict of interest because plan fiduciaries represent both the plan's and the beneficiary's interests. *See, e.g., Heaseley v. Belden & Blake Corp.*, 2 F.3d 1249, 1260-61 (3rd Cir. 1993) (addressing the conflict of interest involved in allowing the plan fiduciary to decide what constitutes "experimental treatment" under an exclusion clause and suggesting that the plan

should have employed an independent organization is such cases); *Doe v. Group Hosp. & Med. Serv.*, 3 F.3d 80, 86 (4th Cir. 1993) (pointing out that "to the extent that Blue Cross has discretion to avoid paying claims, it thereby promotes the potential for its own profit").

Although recognizing that a conflict of interest should be given some weight, the Circuit Courts of Appeals are split on how much weight courts should give that conflict of interest. Some courts use a burden shifting approach to determine the appropriate standard of review. *See Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1322-23 (9th Cir. 1995) (engaging in a two step analysis to examine a fiduciary's alleged conflict of interest). Still others use a "sliding scale" approach. *See Woo v. Deluxe Corp.*, 144 F.3d 1157 (8th Cir. 1998) (under the sliding scale approach, the abuse of discretion standard is applied, with decreased deference given in proportion to the seriousness of the conflict of interest or any procedural irregularity). Finally, other courts are applying a "presumptively void" test under which a decision rendered by a plan administrator with a conflict of interest is presumed to be an abuse of discretion unless the administrator can demonstrate that either (i) under de novo review the result was correct; or (ii) the decision was not made to serve the administrator's conflicting interest. *See Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263 (8th Cir. 1997). Again, this Court is asked to settle a serious split among the Circuit Courts of Appeals in determining the standard of review for ERISA plan fiduciaries acting under an inherent conflict of interest.

As the Plan Administrator, Beg not only acts as a fiduciary to plan participants and beneficiaries, as well as to the Plan itself, but he also owes an obligation to his employers to follow their directives and desires. Plan administrators employed by the very entity (Exxon) which created the plan should be motivated solely by desire to benefit plan participants, in keeping with their fiduciary relationship with beneficiaries.

Because the employment relationship between the entity that created the plan and administrators, like Beg, raises concerns of the existence of a conflict of interest, due consideration of the conflict must be considered in reviewing the decision of the plan administrator. *Duhan v. Texaco, Inc.*, 15 F.3d 1302, 1306 (5th Cir. 1994). Beg's conduct, or lack thereof, in the determinations forming the basis of this litigation raises serious concerns as to whether Beg was acting in conformity with a conflicting motive to benefit his employer Exxon and not the beneficiary of the Plan.

Perhaps the most important method of establishing that an administrator's conduct is in conformity with his fiduciary duty is for the administrator to conduct a thorough investigation independently of the employer. A complete and independent investigation by the administrator also serves to minimize the concerns of the administrator acting under a conflict of interest. The Fifth Circuit has repeatedly endorsed decisions and determinations made by administrator's, not the company's, investigation. *Metzlar* sufficiently investigated); *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601-602 (5th Cir. 1994) (administrator hired independent doctors, an outside investigator, and details other efforts as part of determination process); *James v. Louisiana Laborers Heath & Welfare Fund*, 29 F.3d 1029, 1032 (5th Cir. 1994) (district court remanded for further investigation by administrators until sufficient investigation for determination done). In this case, a thorough investigation would have included, at a minimum, seeking independent medical opinions relating to Petitioner's incapacity, and interviewing not only Exxon management who made the decision to terminate Petitioner, but scrutinizing their audit to see if it justified terminating a 15 year employee, and also Petitioner himself. It is impossible for Beg to have had all the facts available he needed to make this important decision, without even requesting Petitioner's medical records or speaking with Petitioner himself. Beg relates that ultimately, he simply took the word of Exxon management for why Petitioner was terminated. "I . . .consulted the management who made the employment decision and made a judgment that [Petitioner] was

terminated for reasons unrelated to his disability." (1 R 109, quoting from Beg's summary judgment affidavit). When Beg was asked specifically whether he had conducted "any independent investigation" of Petitioner's termination on his own, Beg responded, "On the termination I didn't." (1 R 430, quoting from Beg's deposition). An employee who has dedicated 15 years of his life to his employer deserves more than this.

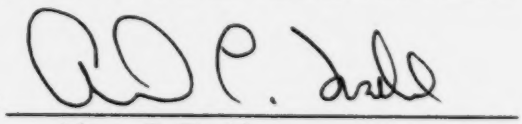
As an employee of the corporate entity over whose employees Beg makes determinations of Plan benefits, Beg's conduct, actions and motivations should be subject to heightened scrutiny as any fiduciary. Petitioner asks this Court to resolve the split among the Circuit Courts of Appeals relating to the standard of review governing benefit denials on behalf of ERISA plan administrators acting under a conflict of interest, by first determining what constitutes a conflict of interest, and then holding that any conflict of interest should be given substantial weight in evaluating such benefit determinations, require Plan Administrators to discharge their fiduciary responsibility, and define what that duty is.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

Respectfully submitted,

THE LAW FIRM OF ALTON C. TODD

By: 

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APPENDIX

U. S. Court of Appeals
FILED
June 4, 1999
Charles R. Fulbruge, III, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40757

W. GREG SHELTON,
Plaintiff-Appellant,

versus

BENEFIT PLAN OF EXXON CORPORATION AND PARTICIPATING AFFILIATES; M ASIF BEG; CIGNA INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(G-97-CV-529)

Before POLITZ, HIGGINBOTHAM and DAVIS, Circuit Judges. PER CURIAM:[1]

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[1] Pursuant to 5TH CIR. R. *47.5,* the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

This matter is before the court on appeal by W. Greg Shelton of an adverse summary judgment. Having considered the briefs, oral arguments of counsel, and pertinent parts of the record, and on the facts as detailed, authorities cited, and analysis made by the district court in its comprehensive Order Granting Defendants' Motion for Summary Judgment, signed and entered on May 27, 1998, the judgment appealed is AFFIRMED.

United States District Clerk
Southern District of Texas
ENTERED
May 27, 1998
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GREG SHELTON	§	
	§	
V.	§	CIVIL ACTION NO.
	§	G-97-529
BENEFIT PLAN OF EXXON	§	
CORPORATION ET AL.	§	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, challenging his denial of benefits. Now before the Court is Defendants' Motion for Summary Judgment. For the reasons that follow, that Motion is **GRANTED.** Consequently, Plaintiff's claims are DISMISSED WITH PREJUDICE in their entirety.

I. FACTUAL SUMMARY

Plaintiff was employed by Exxon Corporation for fifteen years in various managerial positions. In February 1995, Exxon demoted Plaintiff to "Senior Staff Analyst" and transferred him to Exxon's Baytown Chemical Plant. In April 1995, after asking to be allowed to miss a safety meeting because Plaintiff wanted to avoid the embarrassment of seeing former subordinates and supervisors at the meeting, Plaintiff

was forced to attend. Thereafter, due to his alleged humiliation, Plaintiff left work and contends he was unable to attend the next day. Plaintiff was placed on disability leave on April 21, 1995.

Exxon policy prohibits personal use of Exxon computers. In August of 1995, while Plaintiff remained on disability leave, Exxon reassigned his computer to another employee. It was then discovered that on the harddrive of Plaintiff's former computer was a 360 page novel, written by Plaintiff. Also discovered were various letters written to literary agents, which asked for help in seeking a publisher and possible movie deals for the book. Upon further investigation, which Exxon called an "audit," numerous unauthorized software applications also installed on Plaintiff's computer harddrive were also discovered. Exxon also claimed to have found expense account irregularities, and falsification of Plaintiff's time sheet, wherein Plaintiff claimed to have been working but was actually attending a tryout for the television program Wheel off *Fortune* television program. Plaintiff admits, at least partly, to using the computer during the work day for his personal use.

During the investigation, Exxon claims to have contacted Plaintiff several times, asking him to meet with the Exxon investigators. Apparently by that time, Plaintiff had retained counsel and refused to participate in the investigation, other than through his attorney. Plaintiff was terminated in February 1996. Prior to the instant litigation, Plaintiff appeared before this Court in W. Greg Shelton v. Exxon Corp. et al., No. G-96-307. In that case, Plaintiff sued Exxon alleging wrongful termination in violation of federal law; specifically, Plaintiff claimed in that case that Exxon fired him due to his disability, while Exxon contended that Plaintiff's disability had nothing to do with his termination. After this Court denied Exxon's

Motion for Summary Judgment, the case settled for an undisclosed amount on the eve of trial.

Almost a month before his termination, Plaintiff applied for disability retirement and annuitant status with Asif Beg, Administrator of Exxon's Benefit Plan ("Plan"). In addition to serving as Administrator of the Plan, Beg also served as Human Resources Manager for another division of Exxon Corporation. According to the Plan, the Administrator has full and final discretionary authority to determine eligibility for Plan benefits, to construe the terms of the Plan, and to decide appeals by participants or beneficiaries. As part of his investigation, Beg contacted the manager of Plaintiff's department who told him the results of Exxon's audit. Thereafter, during his investigation, Beg was also informed of Plaintiff's February termination.

After completing his investigation regarding Plaintiff's eligibility for benefits, Beg advised Plaintiff of his ineligibility for annuitant status because he was not age 55 and because he had been discharged for reasons unrelated to his disability. In accord with the Plan, however, Plaintiff continues to receive benefits equal to half-pay. Plaintiff's Consolidated Omnibus Budget Reconciliation Act ("COBRA") benefits, which end by operation of law eighteen months after an employee's termination or separation, ended on August 31, 1997, despite Plaintiff's efforts to continue them.

II. STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) . When ruling on a motion for

summary judgment, the evidence is viewed through "the prism off the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). Generally, "a denial of benefits challenged under [ERISA[1]] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary *discretionary authority to determine eligibility* for benefits or to *construe the terms of the plan."* Firestone & Tire Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 5. Ct. 948, 956—57, 103 L.Ed.2d 80 (1989) (emphasis added) . If discretion is given in the Plan to either determine eligibility or construe its terms, the standard of review is the more lenient "abuse of discretion." See id.

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ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," Shaw v. Delta Airlines. Inc., 463 U.S. 85, 90, 103 S~. Ct. 2890, 2896, 77 L.Ed.2d 490 (1983), and "to protect contractually defined benefits," Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148, 105 5. Ct. 3085, 3093, 87 L.Ed.2d 96 (1985) . See generally 29 U.S.C. § 1001 (setting forth congressional findings and declarations of policy regarding ERISA). The parties agree that the Plan at issue is an employee welfare benefit plan covered by ERISA. ERISA § 1132 (a) (1) (B) provides that "[a] civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." See 29 U.S.C. § 1132 (a) (1) (B)

Defendants correctly argue in this case that the abuse-of-discretion standard applies because the Plan expressly grants discretionary authority to the administrator.[2]

III. WHAT EVIDENCE CAN THE COURT CONSIDER?

Although the parties do not discuss the issue, the general rule is that the decision of whether an abuse of discretion has occurred is based upon information known to the administrator at the time he made the decision. See Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1015 (5th Cir. 1992). However, there is a distinction between that evidence considered when reviewing a factual determination and that evidence considered when determining whether the administrator abused his discretion in denying benefits.

> "[W]e now make manifest that a district court is not confined to the administrative record in determining whether, under our analytical framework, a plan administrator abused his discretion in making a benefit determination. This is not to say that a litigant dissatisfied with an administrator's benefit determination is free to disregard the evidence before the administrator and relitigate in court the historical

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2 The Court is cognizant of the Fifth Circuit's reluctance to supplant the judgment of plan administrators; however, this Court notes that the use of deferential review when a plan confers discretion on the administrator, *and* when the administrator makes factual determinations, operates adversely to "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." Bruch, 489 U.S. at 115, 109 5. Ct. at 956.

> facts surrounding a claim. We have long held that in conducting review under an abuse of discretion standard, a district court should evaluate the administrator's fact findings regarding the eligibility of a claimant based on the evidence before the administrator, assuming that both parties were given an opportunity to present facts to the administrator. Yet, in these and other opinions, we have also explained how other evidence, not dealing with the historical facts underlying the benefit determination, and therefore usually not in the administrative record, was relevant under our abuse of discretion analysis.

Wildbur v. Arco Chemical Co., 974 F.2d 631, 639 (5th Cir. 1992).

Plaintiff argues that the Administrator, who also was employed by a separate division of Plaintiff's employer, had a conflict of interest which caused him to deny Plaintiff's application for Plan benefits. Plaintiff further asserts that the Administrator abused his discretion by failing to conduct an independent investigation, and instead relied solely upon the representations and findings of Exxon management regarding the circumstances surrounding Plaintiff's termination. It is clear that Plaintiff's assertion before the Court is not simply "the administrator got it wrong." If such were Plaintiff's contention, then this Court would be bound solely by the administrative record. Instead, Plaintiff asserts that "the administrator got it wrong *because* his interests were in conflict and *because* he did not conduct an independent investigation." Thus, as this Court understands Fifth Circuit precedent, and in light of Plaintiff's allegations of Administrator misconduct, the Court is *not* bound by the administrative record in this case. See Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98, 102 (5th Cir.

1993); Mathis v. Connecticut General Life Ins. Co., 882 F. Supp. 92, 95 (N.D. Tex. 1994)

IV. ANALYSIS

At the outset, the Court notes that even if it is found that a conflict of interest exists, such a finding does not change the standard of review. See Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1014 (5th Cir. 1992). However, any potential conflict of interest is considered when determining whether the Administrator abused his discretion. See Haubold v. Intermedics. Inc., 11 F.3d 1333, 1337 (5th Cir. 1994); Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 525 (5th Cir. 1989) (declaring that a "plan administrator's conflict of interest is certainly material to judicial review under our circuit's pre-Bruch arbitrary and capricious standard")

Generally, application of the abuse-of-discretion standard is a two-step process. See Wildbur, 974 F.2d at 637. This process requires the Court to first determine the legally correct interpretation of the Plan and then examine whether the administrator applied the same. If the administrator failed to apply a legally correct interpretation of the Plan, the Court then determines whether the administrator's actions constituted an abuse of discretion. See id. When determining the legally correct interpretation of the Plan, the Court considers:

(1) whether the administrator has given the plan a uniform construction,

(2) whether the interpretation is consistent with a fair reading of the plan, and

(3) any unanticipated costs resulting from different interpretations of the plan.

Id. at 638 (citing Jordan v. Cameron Iron Works, 900 F.2d 53, 56 (5th Cir. 1990))

If the administrator has applied a legally correct interpretation of the Plan, then no further inquiry is required. See. e.g., Chevron Chemical Co., 47 F.3d at 146; Haubold v. Intermedics. Inc., 11 F.3d 1333, 1341 (5th Cir. 1994). However, if the Court finds the administrator's interpretation legally incorrect, it must then evaluate whether that interpretation constituted an abuse of discretion. In conducting this analysis, the Court considers:

(1) the internal consistency of the plan under the administrator' s interpretation,

(2) any relevant regulations formulated by the appropriate administrative agencies, and

(3) the factual background of the determination and any inferences of lack of good faith.

Wildbur, 974 F.2d at 638 (citing Batchelor v. Intn'l Brotherhood of Electrical Workers Local 861 Pension and Retirement Fund, 877 F.2d 441, 445-48 (5th Cir. 1989)) . If a benefits denial is supported by substantial evidence and is not erroneous as a matter of law, it is not arbitrary or capricious, and therefore is not an abuse of discretion. See Wildbur, 974

F.2d at 637 n.12.[3] Substantial evidence is "' "more than a mere scintilla. It means such relevant evidence as a reasonable mind might. accept as adequate to support a conclusion."'" Girling Health Care, Inc. v. Shalala, 85 F.3d 211, 215 (5th Cir. 1996) (quoting Richardson v. Perales, 402 U.S. 389, 401, 91 5. Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (citation omitted)).

Where, as here, the case does not turn on sophisticated Plan interpretation issues, the Court is not *required* to apply the two-step process of Wildbur described above. See Duhon v. Texaco, Inc., 15 F.3d 1302, 1307 n.3 (5th Cir. 1994) ("However, the reviewing court is not rigidly confined to this two-step analysis in every case."); Rigbv v. Bayer Corp., 933 F. Supp. 628, 631-32 (E.D. Tex. 1996) (eschewing the two-step inquiry of Wildbur and asking simply whether the administrator abused its discretion). The issue in this case is not whether Plaintiff is disabled. Moreover, in this case, the Court is not being called upon to determine the correct interpretation of the Plan. This case, instead, turns upon whether Plaintiff was terminated *due to his disability* or whether he was terminated for other reasons. Indeed, this is the very same issue which was before this Court in Plaintiff's previous case against his employer, Exxon. That case was settled before this issue was resolved. Contrary to Plaintiff's assertions, however, this Court need not actually determine whether Plaintiff was terminated

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3 Apparently, the abuse-of-discretion standard is the equivalent of the arbitrary or capricious standard. See Wildbur, 974 F.2d at 635 n. 7 (noting no substantive difference between "abuse of discretion" and "arbitrary and capricious" standards); Salley, 966 F.2d at 1014 ("In applying the abuse of discretion standard, we analyze whether the plan administrator acted arbitrarily or capriciously.").

due to his disability; instead, this Court need only determine whether the Administrator abused his discretion when he determined that Plaintiff was not terminated due to his disability. On this issue, the summary judgment evidence is clear.

After a careful review of the evidence, the Court concludes that Plaintiff has failed to demonstrate a genuine issue of material fact as to whether Defendant abused his discretion when he found Plaintiff ineligible to receive benefits. The clear terms of the Plan provide that an employee is not eligible for annuitant status unless he is terminated for his incapacity. After conducting an investigation, the Administrator determined that Plaintiff was not terminated for his incapacity, but instead was terminated because of unauthorized use of his computer and irregularities in his time sheet and expense account. The Court understands that the Administrator was actually employed by Exxon in another division; however, this fact, in and of itself, is absolutely insufficient to raise a fact issue regarding whether the Administrator abused his discretion. Moreover, it is clear that the Administrator relied upon the information given to him by Exxon, his own staff, and Plaintiff himself when he made his determination. Under the circumstances, the Court finds, as a matter of law, that this is the kind of information that one would rely upon when acting reasonably. Furthermore, just because this Court may have conducted the investigation differently does not mean the Administrator abused his discretion. Simply put, although Plaintiff alleges a conflict of interest and an inadequate investigation, he offers insufficient evidence to support his contentions and avoid summary judgment. Indeed, to the contrary, the evidence overwhelmingly reveals that the Administrator acted properly and did not abuse his discretion. Thus, in light of the stringent legal standard that Plaintiff must overcome to overturn the

Administrator's decision, Plaintiff's claims must fail here. See Southern Farm, 993 F.2d at 103-04 (holding that a plan administrator's denial of benefits based on the factual determination about a plan participant's cause of death was supported by autopsy report and three medical records, and therefore it was a reasonable decision); Pierre, 932 F.2d at 1563. (holding that a plan administrator's denial of benefits based on the factual determination that the plan participant's death was not "accidental" within the terms of the policy was not an abuse of discretion because the determination was supported by the police investigation, private investigation, and conversations with the deceased's wife) .[4]

Because Plaintiff does not raise an issue of fact, Defendants' Motion for Summary Judgment must be GRANTED. Consequently, all of Plaintiffs' claims are hereby DISMISSED WITH PREJUDICE. The parties are ORDERED to bear their own taxable costs and expenses incurred herein to date. The parties are also ORDERED to file no further pleadings on these issues in this Court, including motions to reconsider or the like, unless justified by a compelling showing of new evidence not available at the time of the instant submissions. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

IT IS SO ORDERED.

DONE this 27th day of of May, 1998 at Galveston, Texas.

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[4] The Court commends counsel for all parties for the excellent work in this case.

/S/_____
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

United States District Clerk
Southern District of Texas
ENTERED
May 27, 1998
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GREG SHELTON	§	
	§	
V.	§	CIVIL ACTION NO.
	§	G-97-529
BENEFIT PLAN OF EXXON	§	
CORPORATION ET AL.	§	

FINAL JUDGMENT

In accordance with the Court's Order Granting Summary Judgment issued on this day, all of Plaintiffs' claims are hereby DISMISSED WITH PREJUDICE. The parties are ORDERED to bear their own taxable costs and expenses incurred herein to date. The parties are also ORDERED to file no further pleadings on these issues in this Court, including motions to reconsider or the like, unless justified by a compelling showing of new evidence not available at the time of the instant submissions. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

THIS IS A FINAL JUDGMENT.

DONE this 27th day of May, 1998 at Galveston, Texas.

/S/
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE